



Prosecuting Attorneys Association of Michigan

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September 21, 2010

The Honorable Wayne Kuipers
Chair
Senate Judiciary Committee
P.O. Box 30036
Lansing, MI 48909-7536

Re: SB 1491, 1492, and HB 6389, 6390

Dear Chairman Kuipers:

In the spring of this year, The Michigan Supreme Court adopted proposed amendments to MRPC 6.425 & 6.610; Adm 2008-39, which changed the current practice of allowing prosecutors and defense attorneys to retain a copy of the presentencing investigation report (PSI). The Prosecuting Attorneys Association of Michigan PAAM asked the Court to reconsider the adoption of the rule for the reasons expressed in the enclosed letter.

In response to our concerns and the concerns of the defense bar, the Court delayed the implementation of the amendments to allow the legislature to clarify the statutes governing the PSI. PAAM worked with you and CDAM on SB 1491 and 1492 to continue the current practice and allow the prosecution and defense to retain a copy of the PSI. HB 6389 and 6390 mirror these bills.

We urge the Senate Judiciary committee to report this package. Thank you for your consideration of this important issue.

Regards,

Ronald J. Schafer
President



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February 25, 2010

Hon. Marilyn Kelly, Chief Justice
Michigan Supreme Court
Hall of Justice
Lansing, MI

RE: Proposed Amendments to MRPC 6.425 & 6.610; Adm 2008-39

Dear Justice Kelly,

On behalf of the Prosecuting Attorneys Association of Michigan, I am writing to ask the court to delay the effective date of this rule, and to republish it for comment.

As originally proposed, this rule merely changed the date for delivery of a copy of the PSI to the parties from 1 day before sentencing to 2 days. Our association had no problem with that proposal, and did not comment on it.

To our surprise, we learned that a proposed amendment to require the return of the copy of the PSI and to preclude the defense and prosecution from retaining a copy, was adopted without notice or an opportunity to address the court. This new rule will cause the following problems:

- ◆ The PSI information is often essential when responding to a defendant's appeal, yet we will not have access to the information.
- ◆ It is even more essential when prosecuting a probation violation or objecting to the possible parole of a prisoner. Because a parole occurs years after the imposition of sentence, no one in the office may even have a memory of the contents of the PSI.

We understand this change was made out of a purported concern that allowing the parties to keep a copy violated MCL 791.229. We submit that concern is erroneous.

There is a specific exemption in MCL 791.229 for access to and use of probation reports, such as the PSI, by law enforcement agencies, which includes prosecutors. The statute states:

MCL 791.229. Records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the records, reports, and case histories. *The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories* and shall permit designated representatives of a private vendor that operates a youth correctional facility under section 20g to have access to the records, reports, and case histories pertaining to prisoners assigned to the youth correctional facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate. (Emphasis supplied)

This statute was interpreted in *People v Hooper*, 157 Mich. App. 669 (1987). In *Hooper*, the prosecutor had a copy of a presentence report on a witness the defense wanted to call in the case. The prosecutor informed the defense that he would use the presentence report to impeach the witness if called by the defense. The defense decided not to call the witness. The defendant was convicted and appealed alleging that the PSI was privileged, and the prosecutor couldn't use it to intimidate the witness from testifying. The Court of Appeals held that the prosecutor's use of the PSI was proper. The court noted that the previously emphasized language in MCL 791.229 allowed the prosecutor to have access to the report and to use it for impeachment. Clearly, the prosecutor had a copy in his possession when he indicated to the defense that he would use it for impeachment.

Moreover, MCL 771.14 requires a PSI to be prepared for the court and discussed in court. It requires review of the report by the prosecution and defense. It specifically allows the court to exempt confidential information. As such, it creates a specific exemption to confidentiality for both prosecutors and defense attorneys. What is the difference between a prosecutor hand writing in his or her file all the information in the PSI or retaining a copy, except that handwriting is inefficient and inaccurate.

In conclusion, we believe this change needs to be revisited to allow for comment from interested parties, and for consideration of the application of *People v Hooper* to the purported need for this amendment.

Thank you for your consideration, and please contact me if you have any questions or need further information.

Sincerely,

Brian Peppler, President

cc: PAAM Officers
Justices of the Supreme Court
Corbin Davis